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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
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10 SUSAN SCHOFIELD,
11 Plaintiff,
12 v.
13 COUNTY OF LOS ANGELES, et al.,
14 Defendants.

Case No. CV 22-4332-JGB (AS)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

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16 This Report and Recommendation is submitted to the Honorable
17 Jesus G. Bernal, United States District Judge, pursuant to 28
18 U.S.C. § 636 and General Order 05-07 of the United States District
19 Court for the Central District of California.

20
21 **INTRODUCTION**
22

23 On June 23, 2022, Susan Schofield ("Plaintiff"), proceeding
24 pro se, filed a Civil Rights Complaint pursuant to 42 U.S.C. § 1983
25 ("Complaint") against the following individuals: (1) the County of
26 Los Angeles; (2) Judy Thomas; (3) Karen La; (4) Sandra Chavez; (5)
27 Wendy Contreras; (6) Juliet Macias; (7) Linda Flores; (8) Arnesha
28 Allen; (9) Bernadette Henley; (10) Laura Menke; and (11) Veronica

1 Betancourt-Parez. (Dkt. No. 1). On August 5, 2022, Defendant
2 Menke filed a Motion to Dismiss the Complaint pursuant to Federal
3 Rule of Civil Procedure 12(b)(6) for lack of jurisdiction, for
4 untimeliness, and because Plaintiff has failed to state a claim
5 upon which relief can be granted.¹ ("Motion," Dkt. No. 39). On
6 August 16, 2022, Plaintiff filed an Opposition to the Motion.
7 ("Opposition," Dkt. No. 43). Defendant Menke filed a Reply on
8 August 25, 2022. ("Reply," Dkt. No. 45).

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10 For the reasons stated below, it is recommended that Defendant
11 Menke's Motion be GRANTED and the Complaint be dismissed with
12 prejudice as to Defendant Menke.

13 14 **PLAINTIFF'S ALLEGATIONS**

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16 In her Complaint, Plaintiff alleges, generally, that her minor
17 children were wrongfully removed from her custody by the Los
18 Angeles County Department of Children and Family Services.
19 (Compliant at 8-45). As to Defendant Menke, specifically,
20 Plaintiff alleges, without identifying Defendant Menke's title or
21

22 ¹ In connection with her Motion, Defendant Menke submitted
23 a Request for Judicial Notice (Dkt. No. 39-3), which should be
24 granted because it requests judicial notice of judicial documents
25 from Plaintiff's juvenile dependency proceedings, which are
26 relevant and appropriate for judicial notice. See Harris v. County
27 of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (court may take
28 judicial notice of undisputed matters of public record including
documents on file in federal or state courts). Plaintiff does not
object to granting Defendant Menke's request for judicial notice
and, in her Opposition, relies on the exhibits of which Defendant
Menke has requested the Court take judicial notice.

1 role in the alleged wrongful action, only that Defendant Menke is
2 believed by Plaintiff to be a resident of the County of Los Angeles
3 (Complaint at 6); that Defendant Menke "knowingly, intentionally,
4 and voluntarily collaborated with the remaining defendants in
5 effectuating their unlawful scheme/plan to keep plaintiff's
6 children from her care, custody, and control for as long as
7 possible" (Complaint at 33); and that Defendant Menke's actions
8 were "undertaken in direct breach of her fiduciary duties to her
9 client, plaintiff" (Complaint at 33).

10
11 In the Motion, Defendant Menke identifies herself as "the
12 Court-appointed attorney for Plaintiff . . . in an underlying Los
13 Angeles County Juvenile Dependency Court case." (Motion at 2).
14 According to Defendant Menke, she "represented [Plaintiff] in the
15 initial adjudication hearing, which was decided in August 2019 and
16 preceded the later disposition hearing wherein [Plaintiff] was
17 represented by other counsel." (Motion at 2). In her Opposition,
18 Plaintiff agrees that Defendant Menke was counsel who was appointed
19 in 2019 to represent Plaintiff at her adjudication hearing and that
20 the decision at that hearing "marked the end of [Defendant] Menke's
21 representation of [Plaintiff] who was thereafter represented by a
22 different attorney." (Opposition at 6).

23
24 Based on these allegations, Plaintiff contends Defendant Menke
25 violated her constitutional rights to substantive due process to
26 be free from the use of deception in judicial proceedings, and to
27 familial association and/or privacy under the Fourteenth Amendment.
28 (Complaint at 30, 32-34). To remedy the purported violations,

1 Plaintiff seeks injunctive and declaratory relief, "corrective
2 action," and "a reasonable process to correct the resulting
3 damages," in addition to monetary damages and costs. (Complaint
4 at 42-45).

5 6 STANDARD OF REVIEW

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8 Under Rule 12(b)(6), a party may move to dismiss a pleading
9 for "failure to state a claim upon which relief can be granted."
10 Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss for
11 failure to state a claim should be granted if the plaintiff fails
12 to proffer "enough facts to state a claim to relief that is
13 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
14 570 (2007). "A claim has facial plausibility when the plaintiff
15 pleads factual content that allows the court to draw the reasonable
16 inference that the defendant is liable for the misconduct alleged."
17 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Although the plaintiff
18 must provide "more than labels and conclusions, and a formulaic
19 recitation of the elements of a cause of action will not do,"
20 Twombly, 550 U.S. at 555, "[s]pecific facts are not necessary; the
21 [complaint] need only give the defendant[s] fair notice of what
22 the . . . claim is and the grounds upon which it rests." Erickson
23 v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citations and
24 internal quotation marks omitted).

25
26 "When ruling on a motion to dismiss, [the court] may generally
27 consider only allegations contained in the pleadings, exhibits
28 attached to the complaint, and matters properly subject to judicial

1 notice." Colony Cove Props., LLC v. City of Carson, 640 F.3d 948,
2 955 (9th Cir. 2011) (citations, footnote, and internal quotation
3 marks omitted). The court must accept the complaint's allegations
4 as true, Twombly, 550 U.S. at 555-56, construe the pleading in the
5 light most favorable to the pleading party, and resolve all doubts
6 in the pleader's favor. Berg v. Popham, 412 F.3d 1122, 1125 (9th
7 Cir. 2005). Yet, the court "need not accept as true allegations
8 contradicting documents that are referenced in the complaint or
9 that are properly subject to judicial notice." Lazy Y Ranch Ltd.
10 v. Behrens, 546 F.3d 580, 588 (9th Cir. 2006). Likewise, "the
11 tenet that a court must accept as true all of the allegations
12 contained in a complaint is inapplicable to legal conclusions."
13 Iqbal, 556 U.S. at 678. Pro se pleadings are "to be liberally
14 construed" and are held to a less stringent standard than those
15 drafted by a lawyer. Erickson, 551 U.S. at 94; see also Hebbe v.
16 Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal incorporated the
17 Twombly pleading standard and Twombly did not alter courts'
18 treatment of pro se filings; accordingly, we continue to construe
19 pro se filings liberally when evaluating them under Iqbal").

20
21 Dismissal for failure to state a claim can be warranted based
22 on either a lack of a cognizable legal theory or the absence of
23 factual support for a cognizable legal theory. See Mendiondo v.
24 Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A
25 complaint may also be dismissed for failure to state a claim if it
26 discloses some fact or complete defense that will necessarily
27 defeat the claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th
28 Cir. 1984).

DISCUSSION

In the Motion, Defendant Menke argues, among other things, that the Complaint is untimely. (Motion at 8-9). For the reasons stated below, the Motion should be granted and the Complaint dismissed with prejudice as to Defendant Menke.

A. Plaintiff's Federal Constitutional Claim Against Defendant Menke is Time-Barred

Because the Civil Rights Act contains no statute of limitations, "the federal courts [] apply the applicable period of limitations under state law for the jurisdiction in which the claim arose." Rose v. Rinaldi, 654 F.2d 546, 547 (9th Cir. 1981). The Ninth Circuit has held that, "[f]or actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions" Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). Thus, a two-year statute of limitations applies here. See Cal. Civ. Proc. Code § 335.1.

Federal law, however, determines when a civil rights claim accrues. TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). A claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996); see also Knox v. Davis, 260 F.3d 1009, 1013 (9th Cir. 2001) (quoting TwoRivers, 174 F.3d at 992).

1 Plaintiff's claim against Defendant Menke arises from
2 Defendant Menke's representation of Plaintiff before and at the
3 initial adjudication hearing. Defendant Menke's representation of
4 Plaintiff began on March 13, 2019 (Defendant Menke's Request for
5 Judicial Notice Exh. A) and, as Plaintiff concedes, Defendant
6 Menke's representation of Plaintiff ended when the initial
7 adjudication decision was rendered on August 5, 2019. (Defendant
8 Menke's Request for Judicial Notice Exhs. D-E; Opposition at 6).
9 By August 27, 2019, Plaintiff was represented by new counsel.
10 (Defendant Menke's Request for Judicial Notice Exh. F). Plaintiff
11 does not allege that she did not know, or did not have reason to
12 know, of Defendant Menke's actionable conduct until sometime after
13 Defendant Menke stopped representing Plaintiff and new counsel
14 appeared on Plaintiff's behalf. Accordingly, Plaintiff's claim
15 against Defendant Menke accrued no later than August 27, 2019, when
16 Defendant Menke was replaced as Plaintiff's counsel. Plaintiff
17 did not file this action until June 23, 2022, nearly one year after
18 the expiration of the two-year limitations period for filing an
19 action against Defendant Menke pursuant to 42 U.S.C. § 1983 and
20 California Code of Civil Procedure § 335.1.

21
22 In addition, Plaintiff has not alleged, let alone established,
23 an entitlement to equitable tolling of the statute of limitations.
24 See Hinton v. Pacific Enterprises, 5 F.3d 391, 395 (9th Cir. 1993)
25 ("The burden of alleging facts which would give rise to tolling
26 falls upon the plaintiff."). "As with the limitations period
27 itself, we borrow our rules for equitable tolling of the period
28

1 from the forum state, California.” Cervantes v. City of San Diego,
2 5 F.3d 1273, 1275 (9th Cir. 1993).

3
4 Although “[a] plaintiff’s pursuit of a remedy in another forum
5 equitably tolls the limitations period if the plaintiff’s actions
6 satisfy [certain] factors” Cervantes, 5 F.3d at 1276, here,
7 Plaintiff has not alleged that she ever has sought a remedy against
8 Defendant Menke in another forum for the acts alleged in the
9 Complaint. Accordingly, Plaintiff has not alleged an entitlement
10 to equitable tolling under Cervantes. See Square 1 Bank v. Lo,
11 2014 WL 4181907, at *7 (N.D. Cal. Aug. 22, 2014) (“The test in
12 Cervantes is applicable where a plaintiff has previously filed a
13 claim against the same defendants, which is not the case here.”).

14
15 Moreover, under California law, “[i]f a person entitled to
16 bring an action . . . is, at the time the cause of action accrued
17 . . . lacking the legal capacity to make decisions, the time of
18 the disability is not part of the time limited for the commencement
19 of the action.” Cal. Civ. Proc. Code § 352(a). Although the
20 record before the Court suggests Plaintiff suffers from bipolar
21 disorder (see, e.g., Complaint at 20, 24), Plaintiff does not
22 allege, and the record does not contain any facts to support a
23 finding that, Plaintiff lacked the legal capacity to make decisions
24 at any time from the date her claim against Defendant Menke accrued
25 to the time the two-year statute of limitations expired.

26
27 Ultimately, Plaintiff has not alleged she is entitled to
28 equitable tolling, let alone presented facts sufficient to

1 establish an entitlement to such tolling. Under such a scenario,
2 it is appropriate to dismiss Plaintiff's claims against Defendant
3 Menke as untimely. See Supermail Cargo, Inc. v. United States, 68
4 F.3d 1204, 1206-07 (9th Cir. 1995) (court will grant a motion to
5 dismiss based on the statute of limitations defense only "if the
6 assertions of the complaint, read with the required liberality,
7 would not permit the plaintiff to prove that the statute was
8 tolled.") (quoting Jablon v. Dean Witter & Co., 614 F.2d 677, 682
9 (9th Cir. 1980)); see also Serrato v. Cnty. of Los Angeles, 2016
10 WL 3982330 (C.D. Cal. Apr. 11, 2016), (recommending motion to
11 dismiss be granted and complaint dismissed as untimely where
12 "Plaintiff has not argued or shown that equitable tolling
13 applies"); Finch v. Whitehead, 2019 WL 5902443, at *4-*6 (W.D.
14 Wash. Oct. 10, 2019) (recognizing that that "because the
15 applicability of the equitable tolling doctrine often depends on
16 matters outside the pleadings, it 'is not generally amenable to
17 resolution on a Rule 12(b)(6) motion'" but recommending complaint
18 be dismissed with prejudice as barred by statute of limitations at
19 motion to dismiss stage where plaintiff had not pleaded any facts
20 entitling him to equitable tolling) (quoting Supermail Cargo, Inc.,
21 68 F.3d at 1206).

22
23 Accordingly, Plaintiff's federal constitutional claim against
24 Defendant Menke is time-barred and should be dismissed without
25 leave to amend.
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1 **B. Plaintiff's Potential State-Law Legal Malpractice Claim**
2 **Against Defendant Menke is Time-Barred**
3

4 Similarly, to the extent Plaintiff intended to raise a state-
5 law legal malpractice claim against Defendant Menke, the potential
6 claim also is time-barred.
7

8 California Code of Civil Procedure § 340.6(a) sets forth the
9 statute of limitations for legal malpractice actions under
10 California law: "An action against an attorney for a wrongful act
11 or omission, other than for actual fraud, arising in the
12 performance of professional services shall be commenced within one
13 year after the plaintiff discovers, or through the use of
14 reasonable diligence should have discovered, the facts constituting
15 the wrongful act or omission, or four years from the date of the
16 wrongful act or omission, whichever occurs first.... [T]he time
17 for commencement of legal action shall not exceed four years except
18 that the period shall be tolled during the time that any of the
19 following exist: [¶] (1) The plaintiff has not sustained actual
20 injury. [¶] (2) The attorney continues to represent the plaintiff
21 regarding the specific subject matter in which the alleged wrongful
22 act or omission occurred...."
23

24 Between the time of the initial adjudication hearing on August
25 5, 2019 and the date on which Plaintiff began to be represented by
26 different counsel on August 27, 2019, Plaintiff knew, or through
27 the use of reasonable diligence should have known, of Defendant
28 Menke's actionable conduct. (See Defendant Menke's Request for

1 Judicial Notice Exhs. A-B, D-F). In fact, Plaintiff does not
2 allege otherwise. Moreover, at that time, Plaintiff had sustained
3 actual injury, in the form of the removal of her children from her
4 custody. (Complaint at 8, 18-19; Opposition at 6). Finally, by
5 August 27, 2019 Defendant Menke had ceased to represent Plaintiff.
6 (Defendant Menke's Request for Judicial Notice Exh. F).

7
8 Accordingly, pursuant to California Code of Civil Procedure §
9 340.6(a), at the latest, Plaintiff had one year from August 27,
10 2019 to file a legal malpractice claim against Defendant Menke.
11 Because Plaintiff did not file the instant action until June 23,
12 2022, and, as explained above with respect to her federal
13 constitutional claim against Defendant Menke, has failed to allege
14 entitlement to equitable tolling, her state-law legal malpractice
15 claim against Defendant Menke is time-barred and should be
16 dismissed without leave to amend.

17
18 **RECOMMENDATION**

19
20 Consistent with the foregoing, IT IS RECOMMENDED that the
21 District Court issue an Order: (1) approving and accepting this
22 Report and Recommendation; (2) GRANTING Defendant Menke's Request
23 for Judicial Notice (Dkt. No. 39-3); and (3) GRANTING Defendant

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1 Menke's Motion (Dkt. No. 39) and dismissing Plaintiff's Complaint
2 with prejudice with respect to Defendant Menke.

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4 Dated: September 14, 2022

5 _____
6 /s/
7 ALKA SAGAR
8 UNITED STATES MAGISTRATE JUDGE

9
10 **NOTICE**

11 Reports and Recommendations are not appealable to the Court
12 of Appeals, but may be subject to the right of any party to file
13 Objections as provided in Local Civil Rule 72 and review by the
14 District Judge whose initials appear in the docket number. No
15 Notice of Appeal pursuant to the Federal Rules of Appellate
16 Procedure should be filed until entry of the Judgment of the
17 District Court.
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